

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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OLIVER PACKAGING AND EQUIPMENT :
COMPANY,

Plaintiff,

: ANSWER

-against-

: Civil Action No. CV14-2381 (WFK)

HEALTHY HEART FOOD SERVICE, INC.,

Defendant.

:
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Defendant, HEALTHY HEART FOOD SERVICE, INC., ("HEALTHY HEART") by its attorney, STEPHEN H. FINKELSTEIN, ESQ., as and for its Answer to the Complaint herein, respectfully sets forth and alleges as follows:

1. Denies each and every allegation set forth in paragraphs numbered "4", "5", "6", "8 through 13", inclusive, "16", "17", "19", "20", "21", "24 through 27", inclusive, of the within Complaint.
2. Denies knowledge or information sufficient to form a belief as to each and every allegation set forth in paragraph numbered "15" of the within Complaint.
3. Denies knowledge or information sufficient to form a belief as to each and every allegation set forth in paragraph numbered "1" of the within Complaint except admits that defendant is a New York Corporation.
4. Denies each and every allegation set forth in paragraph numbered "2" of the within Complaint, except admits that on or about March 29, 2011, HEALTHY HEART signed and submitted to plaintiff an application for credit and refers this Court to said application for all of the pertinent terms and provisions thereof.

5. Denies each and every allegation set forth in paragraph numbered "3" of the within Complaint, except admits that HEALTHY HEART executed a one-sided document on or about March 30, 2011, which is attached as Exhibit "B" to the within Complaint and bearing the date June 24, 2010 in the upper left corner thereof, and refers this Court to said document for all of the pertinent terms and provisions thereof.

6. Denies each and every allegation set forth in paragraph numbered "7" of the within Complaint, except admits that HEALTHY HEART ordered various consumables during the indicated period of time.

7. With respect to the allegations contained in paragraphs numbered "14", "18" and "22" of the within Complaint, defendant assert the same responses as hereinabove set forth to the paragraphs set forth therein by reference.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

8. That plaintiff breached any agreement between the parties by failing to perform and/or not substantially performing all of the terms and conditions of such agreement on its part to be performed.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

9. That plaintiff breached any agreement between the parties by failing to repair the equipment leased or otherwise provided to defendant so as to make any such equipment operable.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

10. That plaintiff failed and refused to deliver consumables in the minimum amounts required as per the document referred to in paragraph "5" hereinabove, notwithstanding defendant's continual requests to plaintiff to deliver such amounts.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

11. That the "Terms and Conditions" document that plaintiff relies upon and attaches as Exhibit "C" to the Complaint herein, was never furnished to defendant, either simultaneously with the execution of any agreement between the parties, nor furnished to defendant in any otherwise timely manner, nor did the defendant ever see or have an opportunity to read or review same and never agreed to same, the first occasion defendant ever saw such document being upon service of the Summons and Complaint herein.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

12. That plaintiff has breached the implied warranty of merchantability, as contained in § 2-314(c) of the Uniform Commercial Code of the State of New York, in that the trays it supplied defendant were defective and were not fit for the ordinary purposes for which goods of that description are used.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

13. That plaintiff has breached the implied warranty of fitness for a

particular purpose, as contained in § 2-315 of the Uniform Commercial Code of the State of New York, in that the trays it supplied defendant were defective and were not fit the particular purpose for which they were intended

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

14. That plaintiff has breached the express warranty that its product would be free from defects in material and workmanship in all material respects for a period of one (1) year from date of shipment.

AS AND FOR A FIRST COUNTERCLAIM

15. That by reason of plaintiff's breach of any agreement between the parties, as aforementioned, defendant has been caused to purchase substitute equipment and, as a result thereof, has sustained monetary damages in the sum of \$31,850, together with interest thereon from January 29, 2014, for which plaintiff is liable to defendant.

AS AND FOR A SECOND COUNTERCLAIM

16. That by reason of plaintiff's breach of any agreement between the parties, as aforementioned, defendant has been caused to use twice the amount of consumables as the result of the continuing failure of plaintiff's equipment, all to defendant's damage in the approximate amount of \$35,000.

AS AND FOR A THIRD COUNTERCLAIM

17. That by reason of plaintiff's breach of any agreement between the parties, as aforementioned, defendant has sustained significant loss of profits, including loss of certain of its customers.

18. That as a result thereof, defendant has been damaged in an amount to be determined at the trial of this action.

AS AND FOR A FOURTH COUNTERCLAIM

19. That by reason of plaintiff's repeated failure to service and/or replace the equipment it provided to defendant so as to enable defendant to process its customers' orders on a daily basis, defendant has been caused to incur substantial overtime costs in an attempt to meet its daily quotas, without sufficient machinery from plaintiff to process same.

20. That as a result thereof, defendant has been damaged in an amount to be determined at the trial of this action.

AS AND FOR A FIFTH COUNTERCLAIM

21. That, upon information and belief, on or about January 23, 2014, at the 25th Annual Conference of the Council of Senior Centers & Services of New York City, defendant's Northeast Regional Sales Manager, Michael J. Magzag, made defamatory statements with regard to defendant when he stated that "defendant's plant malfunction is because defendant maintained them poorly."

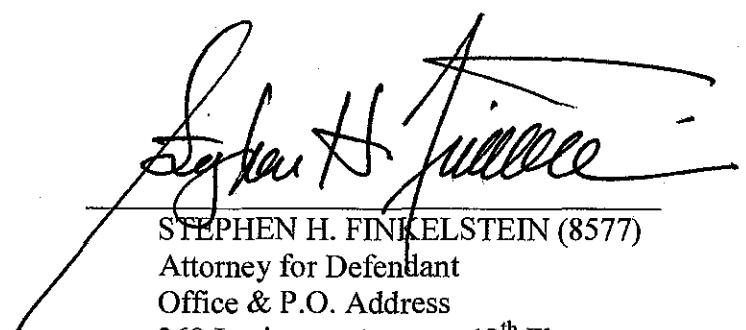
20. That said statement referred to defendant by name, was made of and concerning defendant and was so understood by those who attended this conference to refer to the defendant.

21. That as a proximate result of the above, defendant has sustained a loss of its reputation and a decline in its business attributable to the defamatory statement made by plaintiff's regional sales manager, all to defendant's damage in an amount to be determined at the trial of this action.

WHEREFORE, defendant demands judgment as follows:

- A. Dismissing the Complaint herein;
- B. On the First Counterclaim in the sum of \$31,850, together with interest thereon from January 29, 2014;
- C. On the Second Counterclaim in the approximate sum of \$35,000, together with interest thereon to abide the event;
- D. On the Third Counterclaim in an amount to be determined at the trial of this action;
- E. On the Fourth Counterclaim in an amount to be determined at the trial of this action.
- F. On the Fifth Counterclaim in an amount to be determined at the trial of this action.
- G. For the costs and disbursements of this action, including an award of reasonable attorney's fees, and
- H. For such other, further and different relief as to the Court may be just and proper.

Dated: New York, New York
May 5, 2014



STEPHEN H. FINKELSTEIN (8577)

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